# IBS Bookservice AG Basel (assignee of Pacific Book Service Ltd) v Mawaddah Enterprise Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-04–29 OF 2005
ZALEHA ZAHARI, KN SEGARA AND AHMAD MAAROP JJCA
4 MARCH 2008

*Civil Procedure — Appeal — Appeal against decision of sessions court — Leave to file and serve appeal record out of time — Application made in High Court — Subsequent similar application made in sessions court — Respondent admitted application to High Court to be irregular and would be withdrawing High Court application — Sessions court proceeded to hear and dismissed application — High Court application not withdrawn and High Court judge granted application*

The appellant obtained a summary judgment under O 26A Subordinate Courts Rules 1980 ('SCR') against the respondent on 31 October 2002. The respondent then filed a notice of appeal at the Seremban High Court but failed to file the appeal record within the time frame prescribed by O 49 r 6(3) of the SCR. Therefore, a notice of motion was filed in the Seremban High Court (encl 5) for leave to file and serve an appeal record out of time (ie after a lapse of three months 12 days). The respondent then retained new solicitors who filed a notice of motion in the Seremban Sessions Court, also for an extension of time to file and serve an appeal record out of time on the grounds that the earlier application filed in the High Court was erroneous as the proper forum to grant an extension of time to file and serve a record of appeal was the sessions court, not the High Court. At the time of filing of the second application for extension of time in the Seremban Sessions Court, the application for extension of time filed a year earlier in the High Court was then pending and had yet to be disposed of. The appellant contended that prior to the hearing of the second application before the sessions court judge on 3 September 2004, the respondent had undertaken to withdraw encl 5. The sessions court judge then duly proceeded to hear the application and dismissed it. The respondent did not lodge an appeal against the decision of the sessions court judge. The respondent also did not withdraw encl 5. The High Court subsequently proceeded to hear the respondent's motion, despite the appellant's objection to its validity, and allowed the application for extension in terms of encl 5, which decision was the subject matter of the instant appeal.

**Held**, allowing the appeal with costs:

(1) (per **Zaleha Zahari JCA**) The High Court judge, in considering whether to exercise his discretion, should have taken into consideration the fact that the respondent's application for extension of time in the sessions court had been dismissed by the sessions court judge. The proper course of action when this application for extension of time by the sessions court judge was for the respondent to file an appeal against the decision. The failure by the respondent to honour its undertaking given prior to the hearing in the sessions court was also a relevant factor which should have been taken into consideration. The respondent's failure to act in accord with the undertaking was clearly not bona fides on its part and must necessarily be held against it (see para 6).

(2) (per **Zaleha Zahari JCA**) The respondent clearly had, on the facts of this case, two bites of the cherry. Instead of moving the High Court's jurisdiction by way of an appeal against the dismissal of the application before the sessions court, the respondent attempted to have the High Court exercise its original jurisdiction. The defendant could not be permitted to fall back upon an admitted irregular application (see para 7).

(3) (per **KN Segara JCA** dissenting) It was patently clear that the learned High Court judge had taken into consideration the defendant's reasons in the affidavits to support the motion and the period of delay in filing the record of appeal. In the circumstances, there was no evidence of any improper exercise of discretion to warrant appellate interference and reversal of the said exercise of judicial discretion by the learned High Court judge (see para 20).

(4) (per **KN Segara JCA** dissenting) The application before the sessions court was a blatant abuse of process of court in the light of the pending motion at the High Court. No 'undertaking' given by counsel could become a legal impediment to the pending motion at the High Court — it was a collateral issue of no consequence. Breaches of 'undertaking' by counsel should be the subject matter of complaint to the disciplinary board for appropriate action (see paras 24–25).

(5) (per **KN Segara JCA** dissenting) The appellant's contention, that the sessions court was the correct forum to make an application for extension of time to file the record of appeal in the High Court, was without merit and unsupported by authority. Order 46 r 6(2) SCR expressly stated that the notice of appeal shall be filed in the subordinate court but O 46 r 6(3), in unequivocal terms, stated that the record of appeal shall be filed in the High Court. If the record of appeal was to be filed in the High Court, then, common sense and logic must apply

to mandate the High Court as the proper forum for an application for leave to file the record of appeal out of time (see para 26).

**[Bahasa Malaysia summary**

Perayu memperolehi penghakiman terus di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') terhadap responden pada 31 Oktober 2002. Responden kemudiannya telah memfailkan notis rayuan di Mahkamah Tinggi Seremban tetapi gagal memfailkan rekod rayuan dalam jangkamasa yang ditetapkan seperti yang diperuntukkan di bawah A 49 k 6(3) KMR. Oleh itu, notis usul difailkan di Mahkamah Tinggi Seremban (kandungan 5) untuk kebenaran memfailkan dan menyampaikan rekod rayuan di luar tempoh masa, (iaitu selepas tiga bulan dan 12 hari). Responden kemudiannya mendapatkan peguamcara baru yang memfailkan notis usul di Mahkamah Sesyen Seremban juga untuk lanjutan masa memfailkan dan menyampaikan rekod rayuan di luar masa atas alasan bahawa permohonan lanjutan masa yang terdahulu yang difailkan di Mahkamah Tinggi adalah salah kerana forum yang betul untuk membenarkan lanjutan masa untuk memfailkan rekod rayuan adalah mahkamah sesyen dan bukannya Mahkamah Tinggi. Pada masa pemfailan permohonan kedua untuk lanjutan masa di Mahkamah Sesyen Seremban, permohonan untuk lanjutan masa yang difailkan setahun sebelumnya di Mahkamah Tinggi masih belum didengar dan diputuskan. Perayu menghujah bahawa sebelum pendengaran permohonan kedua di hadapan hakim mahkamah sesyen pada 3 September 2004, responden telah mengaku janji untuk menarik balik kandungan 5. Hakim mahkamah sesyen kemudiannya meneruskan untuk mendengar permohonan tersebut, dan menolaknya. Responden tidak mengemukakan rayuan terhadap keputusan hakim mahkamah sesyen. Responden juga tidak menarik balik kandungan 5. Mahkamah Tinggi kemudian meneruskan mendengar usul responden, walaupun perayu menentang kesahannya, dan membenarkan lanjutan masa kandungan 5, yang mana keputusan tersebut merupakan perkara pokok rayuan ini.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR**) Hakim Mahkamah Tinggi dalam mempertimbangkan sama ada akan melaksanakan budi bicaranya, sepatutnya mengambilkira fakta bahawa permohonan responden untuk lanjutan masa di mahkamah sesyen telahpun ditolak oleh hakim mahkamah sesyen. Tindakan yang sepatutnya selepas penolakan permohonan untuk lanjutan masa ialah untuk responden memfailkan rayuan terhadap keputusan tersebut. Kegagalan responden untuk melaksanakan akujanjinya yang diberikan sebelum pendengaran

permohonan juga merupakan faktor yang relevan yang patut dipertimbangkan. Kegagalan responden untuk melaksanakan akujanji yang diberikan jelas tidak bona fide di pihaknya dan harus dipertanggungjawabkan terhadapnya (lihat perenggan 6).

(2) (oleh **Zaleha Zahari HMR**) Responden dengan jelas telah, atas fakta-fakta kes ini, diberikan dua kali peluang. Di sebalik memohon kepada Mahkamah Tinggi dalam bidang kuasa rayuannya terhadap penolakan oleh mahkamah sesyen, responden mencuba supaya Mahkamah Tinggi menggunakan bidang kuasa asalnya. Defendan tidak boleh dibenarkan bergantung kepada satu permohonan yang diakui cacat (lihat perenggan 7).

(3) (oleh **KN Segara JCA** menentang) Ia adalah amat jelas bahawa hakim Mahkamah Tinggi yang bijaksana telah mempertimbangkan alasan-alasan di dalam afidavit-afidavit untuk menyokong usul dan jangkamasa kelewatan dalam memfailkan rekod rayuan. Dalam keadaan ini, tiada bukti penggunaan budi bicara secara tidak wajar untuk membolehkan campur tangan dan untuk mengakas pelaksanaan budi bicara kehakiman hakim Mahkamah Tinggi yang bijaksana (lihat perenggan 20).

(4) (oleh **KN Segara JCA** menentang) Permohonan di mahkamah sesyen adalah jelas satu penyalahgunaan proses mahkamah dalam keadaan di mana terdapat usul yang belum diputuskan di Mahkamah Tinggi. Tiada 'akujanji' yang diberikan oleh peguambela dapat menjadi penghalang undang-undang kepada usul di Mahkamah Tinggi — ia adalah satu isu sampingan yang tidak mempunyai kesan. Perlanggaran 'akujanji' oleh peguambela sepatutnya menjadi perkara aduan kepada lembaga tatatertib untuk tindakan sewajarnya (lihat perenggan 24–25).

(5) (oleh **KN Segara JCA** menentang) Penegasan perayu bahawa mahkamah sesyen adalah forum yang betul untuk membuat permohonan untuk lanjutan masa untuk memfailkan rekod rayuan di Mahkamah Tinggi, adalah tanpa merit dan tidak disokong oleh autoriti. Aturan 46 k 6(2) KMR jelas menyatakan bahawa notis rayuan patut difailkan di mahkamah rendah tetapi A 46 k 6(3), tanpa sebarang kesangsian, menyatakan bahawa rekod rayuan patut difailkan di Mahkamah Tinggi. Sekiranya rekod rayuan sepatutnya difailkan di Mahkamah Tinggi, maka dalam pemikiran yang waras dan logik Mahkamah Tinggi adalah forum yang betul untuk permohonan kebenaran untuk memfailkan rekod rayuan di luar masa (lihat perenggan 26).]

**Notes**

For cases on appeal against decision of sessions court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 682–683.

**Cases referred to**

*Cropper v Smith* (1884) 26 Ch D 710 (refd)
*Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419 (distd)
*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 (refd)

**Legislation referred to**

Subordinate Courts Rules 1980 O 26A, O 49, O 49 r 2(1), O 49 r 2(3), O 49 r 6(1), O 49 r 6(2), O 49 r 6(3), Form 140

**Appeal from**: Civil Appeal No 12–70 of 2002 (High Court, Seremban)

*Prakash Menon (Geetha Supramaniam with him) (Isharidah, Ho, Chong & Menon) for the appellant.*
*Amir Ismail (Fahrol Pretam & Co) for the respondent.*

**Zaleha Zahari JCA (delivering majority judgment):**

BACKGROUND

**[1]** The background facts are these: The appellant obtained summary judgment under O 26A of the Subordinate Courts Rules 1980 ('the Rules') against the respondent vide Summons No 52–1129 of 2000 filed at the Seremban Sessions Court on 31 October 2002. The respondent filed a notice of appeal against that decision of the sessions court within time on 12 November 2002. The appellant however failed to file the appeal record at the High Court at Seremban within the time frame prescribed by O 49 r 6(3) of the Rules, ie within 21 days after filing of the notice of appeal. The three weeks lapsed on 3 December 2002.

**[2]** The respondent then, on 25 April 2003, filed a notice of motion in High Court at Seremban (encl 5) for leave to file and serve an appeal record out of time, (ie after a lapse of three months 12 days). The reasons given for the delay in filing the application of extension of time to file the record of appeal out of time were, inter alia, because of the long vacation due to the festive season of Aidil Fitri, problems in effecting a change of solicitors, as well as in not receiving instructions.

**[3]** The respondent then retained new solicitors, Tetuan Fahrol, Pretam & Co (the respondent's new solicitors), to act for them. On 6 August 2004, the respondent's new solicitors filed a notice of motion in the Seremban Sessions Court (encl 58), also for an extension of time to file and serve an appeal record out of time. At the time of filing of the second application for extension of time in the Seremban Sessions Court, the application for

A extension of time filed a year earlier in the High Court (ie encl 5), was then pending and had yet to be disposed of. The reason given as to why the respondent's new solicitors considered it necessary to file the second application for extension of time at the Seremban Sessions Court was because they realised that the earlier extension of time application filed in the High
B Court by the respondent's previous solicitors was erroneous. The proper forum to grant an extension of time to file and serve a record of appeal was the sessions court, not the High Court.

C **[4]** The appellant's counsel had in his submissions highlighted the fact that prior to the hearing of the second application before the sessions court judge on 3 September 2004, the respondent's new solicitors had informed the sessions court judge that they would be withdrawing the application for extension of time then pending in the High Court. The sessions court judge
D then duly proceeded to hear the application before her, and then dismissed it with costs. It is common ground that the respondent did not lodge an appeal against this decision dated 3 September 2004 of the sessions court judge dismissing the application for extension of time.

E **[5]** What happened next was this. The appellant did not then act in accordance with their statement before the sessions court judge. They did not withdraw encl 5, the extension of time application filed in the High Court. The High Court judge duly heard encl 5 on 15 April 2005. The High Court judge was of the view that a delay of 3 months and 12 days in filing the
F application for extension of time was not inordinate, and that the respondent had not been prejudiced by the delay. He then allowed the application for extension in terms of encl 5, which decision is the subject matter of appeal before this court.

G **[6]** I am in agreement with the submission of the appellant's counsel that the High Court judge, in considering whether to exercise his discretion, should have taken into consideration the fact that the respondent's application for extension of time in the sessions court had been dismissed by the sessions court judge. The proper course of action when this application
H for extension of time was dismissed by the sessions court judge was for the respondent to file an appeal against that decision. I am also in agreement with the appellant's counsel's submission that the failure on the part of the respondent's counsel to honour their undertaking given prior to the hearing of the application for extension time in the sessions court, was also a relevant
I factor which should have been taken into consideration. The respondent's failure to act in accord with the undertaking given in the sessions court that the application then pending before the High Court, would be withdrawn was clearly not bona fides on their part and must necessarily be held against them.

**[7]** The respondent clearly had, on the facts of this case, two bites of the cherry. Upon the dismissal of the application before the sessions court, instead of moving the High Court's jurisdiction by way of an appeal against that decision, they then attempted to have a different order from the High Court by inviting the High Court to exercise its original jurisdiction, contrary to the earlier undertaking given, and admitted to be irregular one. It is my finding that a defendant who has argued an application for extension of time upon giving the undertaking that an irregularly filed application would be withdrawn, and after having had a pari materia regular application argued and fought on its merits, and lost, cannot be permitted to fall back upon an admitted irregular application.

**[8]** I am of the view that the High Court judge had accordingly erred in exercising his discretion in the manner which he did. Although an appellate court would not ordinarily interfere in the exercise of such a discretionary power, in the circumstance of the present case I am of the view that I am entitled, and it is my duty to do so. The appeal is allowed with costs. The deposit to the appellant on account of taxed costs.

**[9]** My brother Justice Ahmad Hj Maarop has read this judgment in draft and has concurred with the contents therein.

**KN Segara JCA (delivering dissenting judgment):**

**[10]** This is an appeal against the decision of the learned High Court judge allowing the respondent's notice of motion to file the record of appeal out of time, in respect of the respondent's appeal to the High Court at Seremban vide the summary judgment obtained against the respondent, at the Seremban Sessions Court.

**[11]** The appellant and the respondent herein were the plaintiff and defendant, respectively, in the Seremban Sessions Court Summons No 52–1189 of 2000. The appellant and the respondent shall hereinafter be referred to as 'the plaintiff' and 'the defendant'.

**[12]** On 31 October 2002, the plaintiff obtained summary judgment against the defendant pursuant to O 26A of the Subordinate Courts Rules 1980 ('SCR'). The defendant filed a notice of appeal on 12 November 2002.

**[13]** Order 49 of the SCR embodies all the rules in respect of appeals to the High Court from the subordinate courts. Order 49 r 6 of the SCR is the relevant provision with regard to an appeal to a judge in chambers of the

High Court. An appeal in respect of a decision under O 26A of the SCR shall lie to a judge in chambers of the High Court by virtue of O 49 r 6(1) of the SCR.

**[14]** After filing the notice of appeal and complying with O 49 r 6(2) of the SCR, the defendant unfortunately failed to comply with O 49 r 6(3) which reads:

> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court, and the record shall contain copies of:
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> (a) the application for the decision;
>
> (b) all pleadings filed;
>
> (c) all affidavits filed in support of or in opposition to the application; and
>
> (d) the order or draft of the decision appealed from.
>
> Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.
>
> (Emphasis added.)

**[15]** It is important to keep focused that under this rule:

(i) the record of appeal shall be filed in the High Court, unlike the notice of appeal, which has to be filed in the registry of the relevant subordinate court in Form 140, under O 49 r 6(2) of the SCR; and

(ii) that there is no requirement, in express terms, that the record of appeal shall be served on any party, unlike the notice of appeal, which is to be served on every party to the proceedings within 14 days from the date on which the decision was pronounced under O 49 r 6(2) of the SCR.

**[16]** For ease of comprehension O 49 r 6(2) reads:

> (2) The appeal shall be brought by filing a notice of appeal in Form 140 in the registry of the relevant subordinate court, with a copy extended to the registry of the High Court, within 14 days from the date on which the decision was pronounced and serving a copy of the notice on every other party to the proceedings.

**[17]** The significance of where the notice of appeal and the record of appeal shall be filed, as statutorily prescribed will become apparent in the course of this judgment.

**[18]** Having failed to file the record of appeal in the High Court within the time prescribed under O 49 r 6(3) of the SCR, the defendant very correctly filed a notice of motion in the High Court at Seremban on 25 April 2003, for leave to file the said record of appeal out of time. After hearing the parties and considering their written submissions the learned High Court judge granted the defendant leave, on 15 April 2005, to file the record of appeal out of time, in terms of the notice of motion. In exercising his discretion and in allowing the defendant's motion, the learned High Court judge has very correctly borne in mind the dicta in:

(i) *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, as follows:

> A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law ... A fair minded, judge should look at all circumstances of the case before penalising the party who infringes any particular rule of procedure.

and,

(ii) *Cropper v Smith* (1884) 26 Ch D 710 as follows:

> It is well established principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

**[19]** A statement on the object of the court by Bowen LJ above, as way back as in the 19th century, holds true to this day and, shall forever remain a guiding principle, in the administration of justice.

**[20]** It is patently clear that the learned High Court judge had taken into consideration the defendant's reasons in the affidavits to support the motion and the period of delay in filing the record of appeal. In my considered judgment, there is no evidence of any improper exercise of discretion to warrant appellate interference and, reverse the said exercise of judicial discretion by the learned High Court judge, in the circumstances of this case.

**[21]** In his grounds of decision he has set out as follows:

> Antara alasan-alasan yang diberikan peguam pemohon bagi menyokong permohonan ini ialah mengenai perkara yang berkaitan dengan cuti panjang sempena musim perayaan Hari Raya Aidil Fitri, masalah penukaran peguam, masalah mendapatkan arahan dari anakguam dan juga beberapa masalah lain.
>
> Menurut pliding yang difailkan perayu sepatutnya memfailkan rekod rayuannya pada 13 Februari 2003. Namun hanya pada 25 April 2003 perayu telah memfailkan permohonan perlanjutan masa ini. Di atas sebab ini responden plaintif membantah permohonan perayu ini.
>
> Keputusan Mahkamah
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> Di dalam menimbangkan permohonan ini mahkamah mengambil kira dan memberi perhatian kepada perkara berikut:
>
> (i) Jangkamasa kelewatan memfailkan rekod rayuan berkenaan dan permohonan perlanjutan masa.
>
> Di dalam kes ini perayu telah memfailkan permohonan ini dua bulan 12 hari selepas tamat tempoh pemfailan rekod rayuan. Ini pada hemat saya bukan satu kelewatan yang melampau yang memprejudiskan responden.
>
> Di dalam kes *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385, Mahkamah Persekutuan antara lain telah memutuskan seperti berikut:
>
> > A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law. A fair minded judge should look at all circumstances of the case before penalising the party who infringes any particular rule of procedure.
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> Di dalam kes *Cropper v Smith* (1884) 26 Ch D 710 Bowen LJ berkata:
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> > It is well established, principle that the object of the court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights I know of no kind of error or mistake which, if not fraudulent or intended to over reach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.
>
> Berdasarkan perkara (i) di atas dan dengan mengambil iktibar dan teladan dari nas-nas di atas saya membenarkan permohonan perayu dengan kos di bayar kepada responden.

**[22]** The plaintiff contends before us that the defendant had, on 20 August 2004, made an application in the sessions court, identical to the motion pending in the High Court. The plaintiff alleged that the application was made in the sessions court on the ground that the motion in the High Court was erroneously filed and that the proper forum to grant an extension of time is the sessions court. The plaintiff also alleged that it was on that basis the application before the sessions court was heard. The sessions court dismissed the defendant's application to file the record of appeal in the High Court out of time on 3 September 2004.

**[23]** The plaintiff contends before us that the defendant should have appealed against the sessions court decision. The plaintiff further contends before us that instead of appealing and, contrary to an 'undertaking' to withdraw the notice of motion pending before the High Court, proceeded with the said notice of motion in the High Court. The plaintiff also contends before us that the High Court proceeded to hear the defendant's motion despite the plaintiff's objection to its validity.

**[24]** It is my considered judgment that the plaintiff's contentions before us are groundless in law. The motion in the High Court was filed well before an identical application was filed and dismissed in the sessions court. The sessions court, out of deference to the High Court, ought not to have proceeded to hear the identical application before it. The application before the sessions court was a blatant abuse of process of court in the light of the pending motion at the High Court.

**[25]** No 'undertaking' given by counsel can become a legal impediment to the pending motion at the High Court — it is a collateral issue of no consequence. Breaches of 'undertaking' by counsel should be the subject matter of complaint to the disciplinary board for appropriate action.

**[26]** The plaintiff's contention, that the sessions court is the correct forum to make an application for extension of time to file the record of appeal in the High Court, is without merit and unsupported by authority. Order 46 r 6(2) of the SCR expressly states that the notice of appeal shall be filed in the subordinate court but O 46 r 6(3), in unequivocal terms, states that the record of appeal shall be filed in the High Court. If the record of appeal is to be filed in the High Court, then, common sense and logic must apply to mandate the High Court as the proper forum for an application for leave to file the record of appeal out of time. It is, therefore, untenable to suggest, in the absence of any express statutory provision, that the subordinate court is the appropriate forum to obtain leave to file the record of appeal in a superior court.

**[27]** The case of *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419, is not an authority for the proposition that the subordinate court is the proper forum to obtain leave to file out of time, the record of appeal in respect of an appeal to a judge in chambers of the High Court. In that case, the issue that cropped up, inter alia, was with regard to the service of the notice of appeal out of time in respect of a decision that did not fall under O 49 r 6(1) of the SCR. It was not a summary judgment under O 26A of the SCR. The claim was for vacant possession and was allowed by the magistrate. The notice of appeal was filed in the magistrate's court the same day but, was not served on the plaintiff. There, O 49 r 2(1) of the SCR and O 49 r 2(3) of the SCR were the relevant provisions for consideration. In that case Harun Hashim SCJ said at p 422:

> We are of the view, however, that the application for extension of time, could also be properly made to the High Court as the High Court has the power, not under RHC O 3 r 5 because that provision is limited to matters prescribed by RHC (and the time prescribed to serve a notice of appeal from a magistrate's court arises under SCR) but under item 8 of the Schedule to the Courts of Judicature Act 1964. We would, nonetheless, discourage such a practice because of higher costs in the High Court and unnecessary clogging of the High Court calendar. Be that as it may, there was accordingly a proper application before the High Court in this instance.

**[28]** The appeal is dismissed with costs. Deposit towards taxed costs of the respondent.

*Appeal allowed with costs.*

Reported by Sally Kee